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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FERNANDO DAVID MALDONADO, Defendant and Appellant.	A154189 (Contra Costa County Super. Ct. No. 5-161903-0)

Thirty one-year-old defendant Fernando Maldonado was a youth pastor at a church in Martinez. Thirteen-year-old Jane Doe attended his church. In 2012, Doe went to defendant for "advice," which led to friendship, which led to "hanging out," and then to a sexual relationship, which began with a first act of sexual intercourse on September 9, 2012. That sex lasted until December 2014, during which time, Doe would come to testify, they had intercourse on hundreds of occasions, all before she was sixteen-years-old.

Following an eight-day trial, the jury quickly convicted defendant on all 23 counts alleged and also found true the alleged enhancements. He was sentenced to 34 years, eight months in prison. Defendant appeals, with two arguments: (1) the trial court abused its discretion when it refused his motion for a continuance made on the third day of trial, a motion based on his counsel's misunderstanding of Doe's testimony as to the date of the first sexual encounter; and (2) ineffective assistance of counsel based on that misunderstanding. We conclude there was no abuse of discretion, and whatever

counsel's conduct, it could not have prejudiced defendant, not in light of the overwhelming evidence of guilt. We thus affirm.

BACKGROUND

The Facts

Jane Doe lived in an apartment complex in Martinez; defendant, the youth pastor of her church, lived at the same complex. Sometime in 2012, when Doe was 13 years old, she sought some advice from defendant, following which they started "hanging out a lot more," Doe describing how over the next several months they went out for coffee and "chatted" outside of the church setting. That gets us to early September.

On September 9, 2012, Doe left a party around 9:00 or 10:00 p.m., planning to walk home. Defendant offered her a ride, and she accepted. When they arrived at Doe's apartment, she knocked on the door, but no one answered. Doe had no keys, so she returned to defendant's car and asked to use his phone to call her mother. Her mother was in Concord, and did not plan to be home for another 30 minutes, so defendant offered to drive Doe to Concord. Her mother agreed.

Defendant drove off, but passed the Concord freeway exit, and parked on a surface street. He and Doe started talking, and then defendant started kissing Doe on the lips, "making out," using their tongues. Defendant then began touching Doe's thigh, and then under her shirt, and then asked Doe whether she wanted to go to the back seat. She agreed, and they moved to the back seat and defendant got on top of her. They "touched each other" while dressed and then Doe removed her clothes, and they had sexual intercourse for approximately 15 minutes, which ended due to Doe's mother repeatedly calling defendant's phone.

Doe liked defendant, and wrote in her school notebook the date she and defendant first had sexual intercourse, September 9, 2012, a date she eventually used as her pin on her phone. Doe testified that she and defendant communicated via text and Facebook messenger. And they sent each other heart emojis, which made Doe feel special.

Doe estimated that she and defendant had sexual intercourse approximately 10 times while she was 13, always in defendant's car. And, Doe testified, between the ages

of 13 and 14 her feelings toward defendant became stronger because they spent so much time together.

Doe estimated that she and defendant had sexual intercourse approximately 12 time per month while she was 14 years old, including on her 14th birthday. This sex was in defendant's car, other parishioners' cars, defendant's house, his parents' house, and the church. One time they had sex at the church they used the couch in "the pink room," a room used for various church gatherings. At least half of the time when they had intercourse, defendant also put his lips on Doe's vagina; and at one time defendant also asked her to put her lips around his penis.

Doe estimated that she and defendant had sexual intercourse approximately 8 times per month while she was 15 years old. This sex was in similar places: defendant's car, other parishioners' cars, his house, his parents' house, and the church. They also used another church.[1]

During Doe's sophomore year in high school, defendant began working at the company managing the swimming pool at her school, and sometimes when he was at Doe's school, he texted her so that she could meet him and give him a kiss.

Doe told some friends about her relationship with defendant, one of whom testified that in 2012 Doe told her that she and defendant had engaged in sexual intercourse. Doe also had pictures on her phone showing her and defendant kissing.

The sexual activity ended in December 2014, when defendant ended the relationship. Doe was hurt and upset.

Sometime in 2014 officers from the Pleasant Hill Police Department contacted Doe and asked about defendant. Scared, Doe said he was simply her pastor. The officers asked for her phone, which she gave them, but only after deleting the pictures of her and defendant kissing.

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[1] When Doe was 15 years old, defendant also attempted to have anal sex with her on top of the rocking chairs at a church nursery. This caused Doe a lot of pain, and they stopped.

On April 17, 2016, Doe was arrested for residential robbery and burglary and taken to juvenile hall. She spoke to a counselor whom she described as the first adult she was able to trust and told him about her sexual relationship with defendant.

The next day, Doe spoke with Martinez Police Department officer Tyrone Wah and confirmed what she had told the counselor. And on April 19, Doe was interviewed at the Children's Interview Center (CIC), during which she cried and was upset.

After the CIC interview, Wah assisted Doe in making a pretext call to defendant, a call that was emotional for Doe because she had not spoken to defendant for over a year. The call was lengthy, its contents the subject of some almost 20 pages of testimony at trial, and discussed in the Attorney General's brief for several pages. We need not go into that detail, but suffice to say that on the call defendant admitted much, denied nothing, and reacted to Doe's accusatory statements in ways that strongly implied guilt. At the conclusion of the call, when Doe asked if defendant could at least say he was "sorry," defendant responded, "OK, ok then fine sorry for that. I'm sorry. I'm sorry I really am." Defendant then told Doe to read Psalm 51 of the Bible[2], and thanked her for "being strong enough to . . . do this and forgive" him.[3]

An audio of the call was played for the jury, which was also provided the lengthy transcript of the call.

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[2] A detective who was a youth pastor on weekends and engaged in theological training testified that Psalm 51 is about David's confession after he had engaged in sexual relations and sinned with Bathsheba.

[3] This is how the call is described in defendant's own brief (all citations omitted): "During the call, supervised by Wah, she discussed the topics Wah provided to her. [Doe] referred to having sex with [defendant] and [defendant] did not deny it. [Doe] told [defendant] he impregnated her and she had an abortion. [Defendant] replied that he had not noticed anything and it was not true. In response, [Doe] offered to send him copies of the paperwork and [defendant] asked to see them. He later said he was sorry for everything that happened. He said he would have done something had he known she was pregnant and he would have accepted responsibility. Ultimately, [defendant] told [Doe] to read Psalm 51 and said he was truly sorry for everything. Psalm 51 is a song of forgiveness and confession written by David after he arranged to have Bathsheba's husband killed so he could take her as his wife."

Wah arrested defendant, searched his house and collected a cellphone and laptop. He also collected a DNA sample.

Crime scene investigator Brianna Chabot gathered evidence from the pink room at the church on Morello Avenue, including a sample from a couch cushion. Sheriff's Office Crime Lab criminalist Johanna Ballardo testified that the sample collected from the cushion tested positive for semen and that it matched defendant's profile to a statistical certainty.

Doe's testimony concluded on Friday, December 8, on which day the prosecutor also introduced the evidence of the pretext call and the DNA evidence. When trial resumed on Monday, December 11, defendant was not present. The court declared that his absence was intentional, and the case proceeded in his absence.

District Attorney Inspector Darryl Holcombe had expertise in investigating child exploitation cases and in digital forensics, and examined defendant's cellphone, which search produced four website results for "teen" and two website results for "rape." One of the results was a video from a pornographic website called Xvideos that included search terms such as "16," "old," and "teen"; another search of the same pornographic website revealed "15, plus years, plus old, plus teen." Defendant's phone also contained evidence that two videos responsive to those search terms were watched: one was titled "horny underscore, teen underscore, fucked underscore, by underscore, old underscore, man"; the other was titled "teen underscore, fucked underscore, in underscore, real underscore, life."

The Proceedings Below

On November 16, 2016, the District Attorney filed an information charging defendant with 23 counts: eight counts of lewd acts upon a child (Pen. Code, § 288, subd. (a)[4]; counts 1 through 8); eight counts of unlawful sexual intercourse (§ 261.5, subd. (d); counts 9 through 16); four counts of lewd acts upon a child (§ 288, subd. (c)(1); counts 17 through 20); one count of sodomy (§ 286, subd. (b)(1); count 21); and two

[4] All undesignated statutory references are to the Penal Code.

counts of unlawful sexual intercourse (§ 261.5, subd. (c); counts 22 and 23). Counts one through eight further alleged substantial sexual conduct. (§ 1203.066, subd. (a)(8).)

Trial began on December 4, and following three days of motions and jury selection, testimony began on December 7. The People rested on December 12, and defendant put on four defense witnesses, whose testimony totaled some 10 pages in the Reporter's Transcript.[5]

Closing arguments were on December 13, and the jury was sent to deliberate at 11:43 a.m. The jury went to lunch until 1:30 p.m. and returned their verdict at 4:00 p.m. that day, some two and one-half hours of deliberation. Those verdicts found defendant guilty as charged on all 23 counts charged and also found true all special allegations. Defendant was sentenced to 34 years, eight months in prison.

DISCUSSION

The Court Did Not Abuse its Discretion in Denying a Continuance

[5] The four witnesses were:

Scott Denny, administrative pastor at a church in Pleasant Hill. He had known defendant since 2013, and opined that defendant loved the truth and defended what was true and good. Asked whether his opinion would change if defendant did not deny Doe's allegations made in a pretext call and if his semen was found in a location where Doe said she had sex with him, Denny said he would need to speak with defendant before forming an opinion.

Maria Maldonado, defendant's mother, testified that she was in defendant's car driving to the airport when he took a telephone call, the pretext call from Doe; and that defendant was calm during the call.

Pleasant Hill Officer Christopher Anderson analyzed Doe's cellphone and laptop in May of 2014. He found no evidence related to any sexual relationship between Doe and defendant. On cross-examination, Anderson indicated he observed Doe unlock her phone and delete an "app" before she handed the phone to Anderson.

Sarahi Montiel Zetina, one of defendant's nieces, testified she was with him at a birthday party on September 9, 2012. She arrived around 2:00 or 3:00 p.m. and left around 12:30 a.m., and defendant was at the party the entire time Zetina was there.

Defendant's first argument is that the trial court erred by denying his request for a continuance, which request was made on December 6, the third day of trial. This was the background:

During argument on in limine motions, defense counsel indicated he intended to place Doe's credibility at issue by questioning her testimony as to the date she and defendant first had sex. As defendant's brief describes it, the "heart of the defense" was Doe's "credibility as to the first sexual encounter with [defendant]. The defense intended to present alibi evidence as to [defendant]'s location on that date in an effort to demonstrate [Doe]'s lack of credibility as to the first occurrence and all the additional charged incidents. [Citations.]" And it developed, defense counsel had been proceeding on the assumption that the date of the first sexual encounter was September 11, not September 9, apparently because counsel was confused by some testimony at the preliminary hearing,[6] and acting on that assumption, defense counsel intended to present alibi evidence for the date of September 11.

Lengthy discussion followed, during which the prosecutor countered that the discovery he had provided, most significantly Doe's CIC interview, showed that the first time she and defendant had sex was on September 9.

Defense counsel made a motion to continue the trial, on two grounds: (1) to allow him to prepare a motion to recuse the prosecutor;[7] and (2) because his "entire defense is about the [September 11] day, because it's the only spot on the calendar that [Doe] hangs her hat on." Extensive colloquy ensued, in the course of which there was this exchange:

"THE COURT: Yes, you may, but I just have a question about that.

"Are you stating that what you heard on the CIC tape is not 9-9-12.

"MR. RIGGS (defense counsel): What I heard on this CIC tape was 9-11-12.

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[6] The basis for the assumption may have been that a police officer had speculated that the first sexual act was on September 11

[7] The claimed basis for recusal was that: (1) evidence of the September 9 date was "deliberately and intentionally withheld" and (2) defense counsel assumed that the prosecutor obtained the September 9 date by virtue of speaking with Doe without any witnesses, and thus became a witness in the case.

9-11-12. [¶] That's what I thought we heard.

"THE COURT: Not at all. I heard her say at 9-9-12.

"MR. RIGGS: I heard it as 9-11-12.

"THE COURT: There's a controversy again."

Following a break, the court said it would not rule on recusal, but only on the motion to continue. Argument by the prosecutor followed, asserting that there was no surprise, as the CIC interview was produced, and said what it said. As the prosecutor put it, "[t]he only new development is my pointing out, or my belief, or my review, or however you want to phrase it, my presentation of that CIC statement is September 9th, 2012. I understand the Court has done the same, upon your review of the audio, your listening to the audio several times. So I don't think that's a new development, that just means that Mr. Riggs has a difference of opinion as to what is stated on that audio.

"A new development, however, will be some new witness coming forth with information that was disclosed late or just in fact some new witness all together, that potentially changes the state of the evidence. There has been no change of witnesses. There has been no change of the evidence. It has been what it always has been since the initial filing of this case.

"Mr. Riggs has had it for some lengthy time and has relied instead upon the statement of a detective who is unsure at the preliminary hearing and incorrectly stated, or stated September 11th, 2012, but stated in addition to, but I'm not sure.

"Based upon that, it's my belief that the defense grasped on to that date and uses that date as the lynchpin for the first time, and thus has not reviewed the [CIC interview] in comparison. Or it has, as he stated, because he has, believes that she, Jane Doe, indicates that she is saying 9-11-12."

The trial court then asked the prosecutor if he could "assure the Court that you would not be putting yourself on as a witness? For example, as a rebuttal witness, if there is some controversy over the 9-9 and 9-11?" He responded, "[a]bsolutely."

The trial court then denied the motion with a lengthy—and thorough—explanation of the reasons why. The court began by noting it had "carefully" read the primary case

cited by defendant, and then explained why it was inapplicable. The trial court then went on, indicating its familiarity with the governing law and principles, saying this: "With regard to the California Rule of Court 4.113, a motion to continue during trial, . . . is disfavored and will be denied unless the moving party, under Penal Code section 1050, presents affirmative proof in open court that the ends of justice require continuance. [¶] . . . [¶] Going back to the law, the Court must determine if a continuance will be useful. The party must show both materiality of the evidence, necessitating continuance, and that such evidence can be obtained within a reasonable period of time. And that's *People v. Beames* [(2007)] 40 Cal.4th 907 at [p.] 920.

"With regard to the CIC interview tape. For me, it was clear that the Doe in this case said 9-9-12. I am not going to [get] myself involved in this controversy. I agree with Mr. Sanders, [the prosecutor] that that will be an issue that can be debated with the witness and possibly by playing that portion of the CIC tape for the jury, so they can make a determination as to what was said. [¶] . . . [¶]

"With regard to this being a new development and/or surprise, this is not late discovery. The discovery was provided June of 2016. The evidence was certainly not deliberately withheld. And in fact, as I noted and spoke with Mr. Sanders the second time, I was concerned as to whether or not there was a prosecutorial mandate to disabuse Mr. Riggs of the notion that the date was 9-11.

"At the time I had not listened to the CIC tape, but I presumed that the transcript was correct, and I still believe the transcript is correct. And once I've done my research and discovered that Mr. Sanders was under no such duty, Mr. Sanders, without consulting with the Court, other than what that second in chamber conference that we had, did determine that he would disclose it.

"I am not finding that there is materiality . . . something that needs to be investigated. I am not determining that a continuance would be useful. And I'm not determining that there is good cause for this motion to continue. . . . [T]hat there has not been a new development, or that there was surprise involved with regard to this or late discovery.

"Moreover, with regard to any function of defense counsel, as far as hearing the Jane Doe make a statement about 9-9-2012, the only use of his having heard that would be as a prior consistent statement should the prosecutorial witness be questioned about 9-11. And therefore, it would only benefit the People's case and harm the defense case where the prosecutor were to testify to this information.

"He has assured the Court, and I'm assuring defense counsel, that he will not be permitted to testify as to this conversation. I am finding that he did disclose it appropriately, but the reason he didn't put it in writing, as he stated to the Court in chambers, is that he found it consistent with what he had heard on the CIC tape.

"With that said, I am aware that defense counsel may wish to make some inquiry of his witnesses about September 9th, if he chooses to do so. He may, and he has the weekend for that. His case will not start until Monday.

"So with that, I am denying the 1050.[8]"

There was no error.

The Law

California Rule of Court 4.113 provides that "Motions to continue the trial of a criminal case are disfavored and will be denied unless the moving party, under . . . section 1050, presents affirmative proof in open court that the ends of justice require a continuance." Applying such rule, our Supreme Court has spoken on the issue of continuance many times, both in the context of mid-trial motions, like here, and pre-trial motions. The following is illustrative:

"An important factor for a trial court to consider is whether a continuance would be useful." (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.) "[T]o demonstrate the usefulness of a continuance a party must show both the materiality of the evidence necessitating the continuance and that such evidence could be obtained within a

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[8] The trial court allowed defense counsel the weekend "to make some inquiry of his witness about September 9th, if he chooses to do so." The court also granted defense counsel's request that his opening statement be continued to the next day.

reasonable time." (*Ibid*.) "Both defendant and counsel must demonstrate that they exercised due diligence and all reasonable efforts to prepare for trial." (*People v. Grant* (1988) 45 Cal.3d 829, 844.) And a motion for a continuance during trial will be considered untimely if the work to be done could have been accomplished before trial. (*People v. Bittaker* (1989) 48 Cal.3d 1046.) In short, "[a] midtrial continuance may be granted only for good cause" (*People v. Winbush* (2017) 2 Cal.5th 402, 469) ,a determination in the trial court's discretion. (*People v. Fuiava* (2012) 53 Cal.4th 622, 650; *People v. Sakarias* (2000) 22 Cal.4th 596, 646.)

We thus review the trial court's decision for "abuse of discretion." (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118.) "The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked" (*People v. Beames, supra,* 40 Cal.4th at p. 920), as "discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered." (*Ibid.*)

In addition to all the above, the Supreme Court has instructed that in determining whether there is good cause for a continuance, the trial judge " ' "must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion." ' " (*People v. Fudge* (1994) 7 Cal.4th 1075, 1105.)

Here, the continuance was requested on the third day of a trial that would last only five more days. It was after lengthy jury selection, and only after the jury was empaneled, and after lengthy argument on motions in limine. Thus, any continuance would have placed a burden on the court, the empaneled jurors, the witnesses, and perhaps most of all Doe.[9]

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[9] Defendant argues, however glibly, that " '[t]here was no indication the complainant would have been inconvenienced or traumatized' " and since she " 'was almost 14 years old at the time of the first charged incident . . . and almost an adult at the time of trial . . . the continuance easily could have been explained and weathered.' " We

The court did not abuse its discretion.

But even if the trial court had erred—which it did not—it would still not avail defendant, because any error would necessarily be harmless, under whatever standard is used. To put it bluntly, we fail to see how any showing that there was a discrepancy as to the date of Doe's first sexual encounter with defendant would somehow cause a different result here, as Doe testified to over 250 instances of sexual intercourse: 10 times when she was 13; 144 (12 times a month) when she was 14; and 96 (eight times a month) when she was 15. Doe's testimony was corroborated by extensive other evidence, including the DNA match of defendant's profile with a sperm sample taken from the couch in the pink room. Doe told a friend she and defendant had sex, which friend also testified she helped delete texts and photos implicating defendant from Doe's phone. And on top of all that is the telephone call where defendant made numerous incriminating statements**.**

That evidence was apparently the cause of defendant's absconding from the trial. That evidence was undoubtedly the reason the jury took only two and one-half hours to convict defendant on 23 separate counts and finding true the enhancements. That evidence was overwhelming.[10]

Any Ineffective Assistance of Counsel Claim Could Not Have Prejudiced Defendant

Defendant's second argument is that his defense counsel was ineffective in light of his misunderstanding of the September 9 date. In defendant's words, counsel was "ineffective in failing to properly prepare and investigate [defendant's] case, the effect of which was to deny [defendant] his right to fair trial due process and a defense." The

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read the record differently, as it overlooks Doe's demeanor before and at trial: she was crying and upset during the CIC interview, and uncomfortable at trial, testifying that she felt "kind of numb," and felt "hurt" and "used" by defendant.

[10] To the extent defendant contends that the jury would have convicted him of one less count, it is unpersuasive. He was charged with eight counts of lewd acts upon a child under the age of 14 years. Doe testified that defendant had sex with her 10 times while she was 13 years old. Thus, even if the jury discounted the September 9 date, that would still leave nine instances of lewd acts upon a child.

argument fails, as whatever the conduct of his counsel, it could not have prejudiced defendant.

"Defendant has the burden of proving ineffective assistance of counsel. [Citation.] To prevail on a claim of ineffective assistance of counsel, a defendant ' "must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice.' " [Citation.] . . . Moreover, prejudice must be affirmatively proved; the record must demonstrate ' "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. " ' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 389; accord, *People v. Vines* (2011) 51 Cal.4th 830, 875–876.)

In short, to prevail on an ineffective assistance of counsel claim, defendant must demonstrate two things: (1) counsel's performance was deficient, and (2) he suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) And *Strickland* also instructs, a "court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Id.* at p. 697.) Indeed, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (*Ibid.*)

That we do, and conclude for all the reasons set forth above that whatever defendant's counsel's performance, the result could not have been different, not in light of the overwhelming evidence of defendant's guilt.

DISPOSITION

The judgment is affirmed.

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Richman, J.

We concur:

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Kline, P. J.

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Stewart, J.

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